United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2154

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HOWARD LIPINSKI,

Petitioner-Appellant,

-against-

PEOPLE OF THE STATE OF NEW YORK,

Respondent-Appellee.

Docket No. 76-2154

B
P/S

BRIEF FOR APPELLANT
HOWARD LIPINSKI

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT HOWARD LIPINSKI

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QUESTION PRESENTED

Whether appellant was denied his Sixth Amendment right to cross-examine a witness which was necessary to the proper evaluation of his case by the jury.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Henry Werker) entered on July 7, 1976, denying by endorsement a pro se petition for writ of habeas corpus* challenging a judgment rendered after jury trial in the Court of Special Sessions, Yonkers, New York, convicting petitioner-appellant Lipinski of attempted petit larceny and sentencing him to serve 30 days in the Westchester County Penitentiary.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Petition for Writ of Habeas Corpus and Prior Proceedings

On his petition to the district court, appellant asserted that he was denied his right of confrontation and to a fair trial when the trial judge refused to permit him to cross-examine a

*On July 7, 1976, Judge Werker ordered appellant to surrender himself on July 14, 1976. However, according to the docket sheet, on July 13, 1976, Judge Werker granted a certificate of probable cause and stayed the surrender pending appeal.

hostile witness. This claim was clearly raised at trial, and was presented on appeal to the Appellate Term for the Ninth Judicial District. That court affirmed the judgment (the opinion is "B" to the separate appendix to appellant's brief), and leave to appeal to the Court of Appeals was denied (the certificate denying leave to appeal is "C" to the separate appendix to appellant's brief).

B. Proceedings at the Trial Court

On March 15, 1974, appellant was arrested, and a misdemeanor information was signed by a Gimbels store detective named Robert Bendetson. The information charged appellant with petty larceny, in violation of §155.25 of the New York Penal Law, in that, at Gimbels Department Store at the Cross County Shopping Center, he stole a return voucher worth $99.98.

At the trial in the City Court of Yonkers, appellant represented himself. The primary witness for the State was store detective Michael Starrish. Starrish testified that on March 15, 1974, appellant came into Gimbels (17*) carrying a brown shopping bag (18). Starrish saw protruding from the bag an umbrella handle and part of an umbrella (19). Starrish testified that appellant went to the tennis racket area of the sporting goods department, located in the basement. Starrish

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*Numerals in parentheses refer to pages of the transcript of the trial.

said that appellant took two tennis rackets from the wall, put them into his shopping bag, and went to a sales counter (19). The sales person there filled out a return voucher (21), took it to the manager for signature (21), returned, and handed it to appellant (22). Appellant was immediately placed in custody.

In defense, appellant called the second store detective, Robert Bendetson, the person who had signed the complaint. In his examination of Bendetson, appellant elicited from him that he did not read the complaint form before he signed it (92) and that the complaint contained several errors. These errors were the time of the alleged events (91), the spelling of appellant's name (93), appellant's address (96), and the total amount of money involved (98). During the course of the examination by appellant, the Assistant District Attorney objected to the manner in which the examination was being conducted:

> Your Honor, if I may, I would like to advise, Mr. Lipinski, has called his own witness, in the course of the questioning Thursday, it would be more of a characterization as cross examination, one thing.
>
> (93-94).

The judge agreed with the prosecutor, and stated to appellant:

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*The record shows that Starrish told the salesperson what he had observed and instructed the salesperson to proceed with the transaction. Since this established that the voucher was not given to appellant in reliance on a misrepresentation, as the statute requires, the court found that appellant could not be found guilty of the substantive count, and later instructed the jurors that they could find only an attempt but not a completed crime.

> Mr. Bendetson is your witness. Under the rules of examination, you are to examine this witness without leading. And, of course, you are not to the term is -- what is termed cross-examination prior. The questions you asked prior to this can easily be categorized as cross-examination I believe. You are to confirm what is the normal examination of this witness.
>
> (94).

Then appellant began examining the witness concerning a conversation the witness had had with appellant's father (99). At an in-chambers conference, appellant explained that he wished to use the conversations between his father and Bendetson to refresh Bendetson's recollection and show that Starrish and Bendetson lied about what occurred (100). Appellant stated that he would use a tape made of that conversation to challenge Bendetson's credibility if Bendetson lied on the witness stand (101).

The court rejected the plan of defense in the following colloquy:

> Before we get into that point, I must understand what you're trying to do. Mr. Bendetson is your witness.
>
> (101).
>
> I have to inform you you can't impeach the credibility of your witness. Whatever your witness says on the witnessstand [sic] you're bound by the answers unless [under New York law] you have a statement in writing, sworn under oath by the witness, or a statement subscribed by the witness. Without that you couldn't do that.
>
> (102).

What I'm trying to say is that these people are your witnesses, you are bound by the answers they give....

When you're bound you can't come back and say didn't you say something you have in writing....

I'm trying to explain. If what he says differs from what he said then, you are bound by what he says that's damaging to your cause, you're bound by it. You are not able to show that he said something different unless a statement under oath, a statement in writing, subscribed by the witness....

(103).

... I want to make sure, Mr. Lipinski, understands the potential jeopardy he might put his case in. I don't know what he has in mind. I haven't seen your statement. I'm telling you you're going to be held bound by what it is. You will not be given the opportunity to contradict what was said unless you have something in writing and subscribed to, or some information or statement under oath, because that is the law. I want you to understand that clearly....

You're certainly entitled to ask what he said.

(104).

You can do that in a certain way if Mr. Bendetson says something you feel is different in your transcript or your notes of what he said on the 15th. You are not able to show the Jury he made a prior inconsistent statement. You are bound by what he says here. If I allow you to go into the 16th, not in the cross-examination of adverse witnesses.

(105).

Appellant tried to explain that the witness was adverse to him (105). The court examined the transcript of the con-

versation (attached to appellant's separate appendix at "D"), and the judge again said:

> If you interject anything, I can't let you impeach his credibility, and I'll let you question what he may have knowledge of. I can't let you impeach his credibility. You're going to be bound by what he says. Normally when you present a witness you have a pretty good idea of what he has to say. You don't present a witness to impeach what he says.
>
> (107).

See also transcript at 111.

When the trial resumed, the court sustained an objection to appellant's inquiry about the conversation (115). On continued examination, Bendetson said he saw a black umbrella sticking out of the shopping bag (117). Counsel then referred to the controversial conversation and an objection was sustained (121-122).

The credibility of Starrish and Bendetson was seriously questioned by a portion of the State's own case presented through the testimony of the salesperson Louis Pistecchia (57). Pistecchia's testimony established that when appellant brought the two tennis rackets to the cashier's desk, he gave to Pistecchia a sales slip dated the previous day, March 14, 1974, and signed by Lipinski, which showed he bought the two tennis rackets (Wilson T-3000) and a third one (59-60).* Supporting

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*Since the summations of appellant and the Assistant District Attorney were not transcribed, the record does not reflect whether appellant argued to the jury that he was the legitimate owner of the rackets.

the version of the events that appellant had purchased the rackets was the testimony of defense witness Domenica Scillemi, a salesperson at Gimbels. She testified that appellant had, on March 14, 1974, discussed the purchase of tennis rackets (133, 135).

The conversation between appellant's father and Bendetson, as reflected by the transcript (see appellant's appendix "D") shows that Bendetson had stated that he did not see an umbrella in the shopping bag.

ARGUMENT

APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE A WITNESS WHICH WAS NECESSARY TO THE PROPER EVALUATION OF HIS CASE BY THE JURY.

During the course of the trial appellant, acting as his own attorney, argued before the trial court that he wished to impeach a witness he had called to the stand with a prior inconsistent statement. The judge made quite clear that he would permit no such procedure adhering to the rule that a party cannot impeach his own witness.*

Judicial precedents demonstrate that the rule that a party vouches for the credibility of his witness is being abandoned. See e.g., United States v. Scarbrough, 470 F.2d 166, 168 (9th Cir. 1972); United States v. Bryant, 461 F.2d 912, 917 (6th Cir. 1972); United States v. Lineberger, 444 F.2d 122 (4th Cir. 1971), cert. denied, 404 U.S. 1060 (1972). See also Federal Rules of Evidence 607.

In Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court clearly established that if the voucher rule precluded the defendant from impeaching a witness who gave evidence against him or who failed to give expected helpful evidence that his rights under the Sixth and Fourteenth Amendments were

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*The one exception the judge recognized was under N.Y. Crim. Proc. Law §60.35(1) permitting impeachment of ones own witness with a subscribed or sworn statement relating to a material issue in the case.

violated. The ruling applied to any witness, whether called by the defense or by the State:

> The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State.
>
> 410 U.S. at 296.

In the present case, the credibility of Bendetson and Starrish was critical to the determination of the appellant's guilt. Indeed, the interpretation of what they testified that they saw was contradicted by other portions of the Government's case indicating that appellant had purchased the tennis rackets a day before the events in question. The impeaching evidence may have been critical to the jury's determination and the judge's ruling violated appellant's right to a fair trial.

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and the writ of habeas corpus issued.

Respectfully submitted,

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January 18, 1977

January 19, 1977

I certify that a copy of this brief has been mailed to the District Attorney of Westechester County.

Phyllis S. Bamberger